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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 564

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE, PETITIONER

v.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Seventh Circuit (R. 58) reversing an order of the District Court for the Northern District of Illinois (R. 41) discharging petitioner from respondents' custody. The case arose in the following manner:

Petitioner enlisted in the United States Army

in 1926 and was discharged in 1929. On or about March 12, 1930, he reenlisted for a term of three years but went absent without leave on or about July 2, 1930, and remained absent in desertion until August 1942, at which time he was apprehended. On or about October 13, 1942, he was restored to duty for the duration of the war plus six months, pursuant to the Extension of Service Period Act of December 13, 1941 (Appendix A, *infra*, pp. 18-19).[1] On or about March 15, 1943, he again went absent in desertion. (R. 7.) On or about March 16, 1944, he was inducted into the Army; he did not reveal his former enlistment and desertion (R. 7, 8). He was honorably discharged on June 29, 1946. The certificate of discharge stated that petitioner was "honorably discharged from the military service" and gave the "Date of Induction" as March 16, 1944, but the space for "Date of Enlistment" was left blank (R. 39).

In 1948, the Criminal Investigation Division of the Army, through its fingerprint department, discovered that petitioner, as the inductee in 1944, was the same person who had deserted in 1943 (R. 7,

[1] It was alleged in the petition for a writ of habeas corpus (R. 3) that "in 1935 or 1936" petitioner "tendered himself to the civil authorities, namely the Sheriff of McClain County, Illinois, at Bloomington, Illinois, as a deserter" and that the Sheriff "received a response from the Federal authorities, namely, the Federal Bureau of Investigation or the United States Army, stating that [petitioner] was not wanted, whereupon [petitioner] was released" by the Sheriff. These allegations were denied in the return to the writ (R. 6) and no evidence was heard and no findings of fact made thereon by the District Court.

15). In February 1949, upon further investigation, petitioner was arrested. Thereafter he was tried by a general court-martial convened at the headquarters of the Fifth Army, Chicago, Illinois, and convicted of the 1943 desertion, under the 58th Article of War, Act of June 4, 1920, c. 227, 41 Stat. 800, 10 U.S.C. 1530. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and three years at hard labor. On December 7, 1949, the Commanding General, respondent Lieutenant General S. J. Chamberlin, approved the sentence but reduced the period of confinement to ten months and mitigated the dishonorable discharge to a bad conduct discharge (R. 7). As required by AW 50(e) (as amended June 24, 1948, c. 625, 62 Stat. 604, 635, 10 U.S.C., Supp. III, 1521, Appendix A, *infra*, pp. 14-17), General Chamberlin withheld the order directing the execution of the sentence pending appellate review as prescribed by that article.[2]

Six days later, on December 13, 1949, before any action was taken by the Board of Review pursuant to AW 50(e), petitioner filed the petition for a writ of habeas corpus involved in this proceeding in which he claimed that he was a civilian not subject to the jurisdiction of the Army (R. 2-4). A writ was issued (R. 5) and a return was filed setting forth petitioner's military history as

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[2] The full text of General Chamberlin's order, taken from the official court-martial record, is copied in Appendix B, *infra*, p. 19.

detailed above (pp. 1-3) and pointing out, *inter alia*, that his conviction had not been reviewed and acted upon by the Board of Review or the Judge Advocate General in accordance with prescribed military procedure (R. 6-9). A hearing was held in the district court on December 16, 1949, at which the only evidence introduced was a certified copy of petitioner's honorable discharge certificate dated June 29, 1946 (R. 39). After argument of counsel, the court on the same day entered an order discharging petitioner from respondents' custody and enlarging him upon his own recognizance in the sum of $100 pending appeal (R. 41).

On respondents' appeal, the court of appeals on October 5, 1950, held that the district court had no jurisdiction to hear petitioner's habeas corpus petition until the remedies under Articles of War 47, 50(e), and 53 had been exhausted.[3] It declined, therefore, to pass upon the merits of petitioner's contention that he was not subject to military

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[3] AW 47(c) (Appendix A, *infra*, p. 14) requires review and approval of a conviction by a general court-martial by the convening authority, in this case, General Chamberlin. The court of appeals stated that petitioner filed his petition for a writ of habeas corpus before General Chamberlin acted on the conviction but that the action of General Chamberlin in approving and reducing the sentence was announced before the hearing in the district court. As we have seen, General Chamberlin's action was dated six days before the petition was filed. Article 50(e), however, required review by the Board of Review, and by other authorities in certain contingencies, and final approval before General Chamberlin could order the execution of the sentence. Article 53 (Appendix A, *infra*, pp. 17-18) provides a new remedy by way of a motion addressed to the Judge Advocate General for a new trial or other relief. See *Gusik* v. *Schilder*, 340 U.S. 128.

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jurisdiction. (R. 53-57; 184 F. 2d 404.) The cause was accordingly remanded to the district court "with instructions to dismiss relator's petition for writ of habeas corpus, to discharge said writ and remand relator to the custody of respondents, such action, however, to be without prejudice to the right of relator to file a new application for a writ of habeas corpus following exhaustion of indicated administrative remedies under the Articles of War" (R. 57).

DISCUSSION

We think the court of appeals was clearly correct in holding on this record that petitioner's attempt to attack collaterally the jurisdiction of the Army to try him for his 1943 desertion is premature. *Gusik* v. *Schilder,* 340 U.S. 128. At the time of the decision below, the review by the Board of Review required by AW 50(e) had not been completed and there had been no final appellate approval of petitioner's conviction and sentence, without which his ultimate sentence could not be executed. It follows *a fortiori* from the *Gusik* decision, requiring the exhaustion, in addition, of the new remedy by way of a motion for a new trial or other relief provided by AW 53 before recourse may be had to habeas corpus, that petitioner had no standing to attack his conviction.

Neither is petitioner in any better standing as of this date. On October 30, 1950, after the decision below, the Board of Review completed its ex-

amination of the record of petitioner's trial and held it to be legally sufficient to support the finding of guilty and the sentence. Since neither the Board nor the Judge Advocate General deemed confirming action necessary, the Judge Advocate General on October 31, 1950, in accordance with the provisions of AW 50(e)(1), transmitted the Board's holding to General Chamberlin and advised him that he was authorized to order the execution of the sentence.[4] We are advised by the Office of the Judge Advocate General that General Chamberlin has taken no further action on the sentence pending final disposition of the instant proceeding. In the absence of a final order by General Chamberlin the administrative process under AW 50(e) is incomplete, even for the purposes of a motion under AW 53. Cf. *Falbo* v. *United States*, 320 U.S. 549, 553-554. The promulgation of such an order is not a mere ministerial act, for under AW 51(a) (Appendix A, *infra*, p. 17) General Chamberlin has "the power to mitigate, remit, or suspend the whole or any part" of the sentence. This power includes, of course, the power to remit entirely the sentence to imprisonment.

Petitioner attempts to circumvent the rule as to exhaustion of the processes prescribed by the Articles of War by asserting that the Army's juris-

[4] The full texts of these actions, taken from the official court-martial record, are set forth in Appendix B, *infra*, pp. 19-21.

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diction over him was terminated by virtue of his honorable discharge in 1946. But that discharge related only to his term of service pursuant to his induction in 1944, both by reason of the dates specifically appearing in the discharge, and as a matter of law.

The legal irrelevance of the 1946 discharge to the earlier 1930 enlistment results from the prohibition, in AW 108, of any but a special type of discharge when the discharge takes place before the expiration of an enlistment.[5] The enlistment from which petitioner deserted would not otherwise have expired until January 25, 1948, because the Extension of Service Period Act extended its term to six months after the termination of the war (see Appendix A, *infra*, pp. 18-19). Moreover, AW 107 prevented the expiration of an enlistment before the making up of time lost in desertion,[6] and this time could not be deemed made up

[5] AW 108, in effect in substantially the same form from 1806 through 1946 (10 U.S.C. 1580), provided that "no enlisted man shall be discharged from [the military] service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial."

[6] Article 107 [10 U.S.C. 1579]. Soldiers to make good time lost.

"Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be

by the 1944-1946 military service, since an enlistment by a soldier already subject to an existing enlistment "without having first received a regular discharge" is defined in AW 28[7] as a desertion and the soldier is deemed to have enlisted "fraudulently." The combined effect of Articles 28, 107, and 108 accordingly prohibited the discharge of petitioner from the earlier enlistment from which he deserted, in the absence of a special order as provided in Article 108.

The consistent administrative interpretation likewise supports this conclusion. Thus, the 1928 Manual for Courts-Martial, United States Army, which was in effect until February 1, 1949, provided (p. 8):

> A discharge, other than dishonorable, releases only from the particular contract and term of enlistment to which it relates, and therefore does not terminate other subsisting enlistments or relieve the soldier from

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liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve."

[7] "Article 28 [10 U.S.C. 1499]. Certain acts to constitute desertion.

* * *

"Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein."

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liability to trial by court-martial for an offense committed during any of such enlistments.[8]

Petitioner relies principally upon *Ex parte Drainer*, 65 F. Supp. 410 (N.D. Calif.), affirmed *sub nom. Gould* v. *Drainer*, 158 F. 2d 981 (C.A. 9). That case involved a desertion from the Marine Corps. The Articles for the Government of the Navy, as distinguished from AW 107, did not make mandatory the serving of the time lost in desertion,[9] nor

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[8] The 1949 Manual for Courts-Martial, United States Army, contains the same language (p. 10), except that the words "or bad conduct" are added after the word "dishonorable." See also the following:

Dig. Op. JAG 1912, p. 462:

"XXII A. An honorable discharge releases from the particular contract and term of enlistment to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment."

Dig. Op. JAG 1912-40, p. 381:

"(6) * * * A member of the National Guard, District of Columbia, did not respond on August 5, 1917, to the draft under the President's proclamation of June 3, 1917, and was dropped as a deserter. He was drafted into the Federal service on October 11, 1918. He has now been honorably discharged. The present status of the soldier is that of a deserter from the Army of the United States. His honorable discharge released him only from the term of enlistment which he entered into by reason of his draft on October 11, 1918. It did not release him from his obligations under the draft of July 3, 1917, which became effective as to him on August 5, 1917. 251.29, Jan. 25, 1919."

In CM 336336, case of Taylor (not reported), the Board of Review, on May 13, 1949, held legally sufficient a conviction for desertion where the accused had received an honorable discharge from a subsequent enlistment.

[9] The Act of May 21, 1928, c. 650, 45 Stat. 620, 34 U.S.C. 183a, provides in pertinent part:

"* * * every enlisted man in the naval service who, without proper authority, absents himself from his ship, station, or

did they prohibit a discharge prior to the end of the term of an enlistment, as is the case under AW 108. Accordingly, the *Drainer* decision is distinguishable. Moreover, the reasoning of the decision is unpersuasive and ascribes undue weight to the remarks of this Court in the only decision cited as authority, *United States* v. *Kelly*, 15 Wall. 34, 36, which held that a soldier's bounty was not forfeited where he returned from absence without leave and was restored to duty upon condition that he make up the lost time. Kelly's subsequent honorable discharge was considered an adequate substitute for removal of the charge of desertion from the rolls, but the characterization of the discharge as a final judgment of the Government does not support the view that such a discharge affects a desertion under an earlier, separate, and uncompleted enlistment.

The same considerations clearly distinguish *Hirshberg* v. *Cooke*, 336 U.S. 210, upon which petitioner also relies. For that case involved only the effect of an honorable discharge upon the jurisdiction of the Navy to try a sailor, who had re-enlisted, for an offense committed during the enlistment terminated by the discharge. The other cases

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duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, *may be permitted to serve*, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such unauthorized absence or confinement, amount to the full term of his enlistment." (Italics supplied.)

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cited by petitioner involved substantially similar facts.

But even if it should be thought that there is an unsettled question as to the Army's jurisdiction to try petitioner for his 1943 desertion, he is in no better position. For as this Court said in *Gusik* v. *Schilder*, 340 U.S. at 131-132:

> The policy underlying that rule [precluding a challenge by habeas corpus in a federal court of the jurisdiction of a state court until state procedures are exhausted] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

In view of this Court's disposition of the intervening *Gusik* case, a question remains as to the appropriate order to be entered in this case. In *Gusik* this Court remanded the cause to the court

of appeals to hold pending Gusik's recourse to the remedy under AW 53. But in that case "Trial of the case in the District Court had ended before the effective date of Article 53 and the question of the exhaustion of the new remedy which the Article affords was not raised until the case was in the Court of Appeals." In those circumstances this Court thought that Gusik should "not be put to the time and expense of trying anew the case which he tried when he had no relief other than habeas corpus" in the event the motion under AW 53 should be denied. 340 U.S. at 133-134. Here, on the other hand, as we have pointed out, the steps prescribed by Articles 50(e) and 51(a) had not been completed at the time the petition for a writ of habeas corpus was filed and there still has been no final action by General Chamberlin under Article 51(a). Beyond that, the remedy under Article 53 will be available to petitioner if he sees fit to invoke it in the light of such final action as General Chamberlin may take. Moreover, the very basis for a habeas corpus proceeding may be eliminated in view of General Chamberlin's power to mitigate, remit or suspend the whole or any part of petitioner's sentence. In addition, as distinguished from the situation in Gusik's case, the trial of the instant proceeding in the district court consisted largely of arguments of counsel on the legal issues presented by the pleadings. Hence, petitioner will suffer no great inconvenience if he should be re-

quired to proceed anew after the remaining procedures are exhausted.

If, however, this Court should feel that these factors do not differentiate this case from Gusik's in respect of its proper disposition, we suggest that it would be appropriate to grant the writ of certiorari, vacate the judgment of the court of appeals, and remand the cause to that court with directions to hold it pending reasonable opportunity for completion of the administrative processes.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

ROBERT S. ERDAHL,
J. F. BISHOP,
Attorneys.

MARCH 1951.

APPENDIX A

The pertinent provisions of the Articles of War, as amended by the Act of June 24, 1948, c. 625, title II, 62 Stat. 634, 635, 638, 639, are as follows:

Art. 47 [10 U.S.C. Supp. III, 1518] Action by convening authority—* * *

* * * * *

(c) Action on record of trial.

Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

(d) Approval.

No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: * * *

* * * * *

Art. 50 [10 U.S.C., Supp. III, 1521] Appellate review—* * *

* * * * *

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(e) Action by Board of Review in cases involving dishonorable or bad-conduct discharges or confinement in penitentiary.

No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence,

but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

* * * * *

(g) Weighing evidence.

In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of wit-

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nesses, and determine controverted questions of fact.

* * * * *

Art. 51 [10 U.S.C., Supp. III, 1523] Mitigation, remission, and suspension of sentences —(a) At the time ordered executed.

The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. * * *

* * * * *

Art. 53 [10 U.S.C., Supp. III, 1525] Petition for new trial.

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided,* That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within

one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Section 2 [10] of the Act of December 13, 1941, c. 571, 55 Stat. 799, 800, 50 U.S.C. App. 732, provided:

The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section [during the existence of any war in which

[10] The Joint Resolution of July 25, 1947, c. 327, Sec. 3, 61 Stat. 451 (see 50 U.S.C., Supp. III, App. 732), provided that in the interpretation of this section relating to the extension of periods of service, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress.

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the United States is engaged, and during the six months immediately following the termination of any such war]: *Provided,* That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

APPENDIX B

The following documents are of record in the official file, No. 339567, of The Judge Advocate General's Office:

HEADQUARTERS FIFTH ARMY

Chicago 15, Illinois

7 December, 1949.

In the foregoing case of Recruit William H. Giese, RA 6 758 678, 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, the sentence is approved, but the period of confinement is reduced to ten months and the dishonorable discharge is mitigated to a bad conduct discharge.

The Post Guardhouse, Fort Sheridan, Illinois, is designated as the place of confinement.

Pursuant to Article of War 50e, the order directing the execution of the sentence is withheld.

[Signed] S. J. CHAMBERLIN,
S. J. CHAMBERLIN,
Lieutenant General, U. S. Army,
Commanding.

DEPARTMENT OF THE ARMY

Office of The Judge Advocate General,
Washington 25, D. C.

Board of Review

CM 339657 30 October 1950.

UNITED STATES

v.

RECRUIT WILLIAM H. GIESE (RA 6758678), 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois.

Fifth Army

Trial by G.C.M., convened at Chicago, Illinois, 16 and 30 June and 7 July 1949. Bad conduct discharge, total forfeitures after promulgation and confinement for ten (10) months. Post Guardhouse.

HOLDING BY THE BOARD OF REVIEW

GUIMOND, BISANT AND OEDING
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

[Signed] J. A. GUIMOND, J.A.G.C.
[Signed] OSCAR M. BISANT, J.A.G.C.
[Signed] ERNST C. OEDING, J.A.G.C.

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1st Indorsement

October 31, 1950.

Dept. of Army J.A.G.C.

To the Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Recruit William H. Giese (RA 6758678), 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

[CM 339657].

For the Judge Advocate General;
[Signed] W. P. CONNALLY, JR.
WILLIAM P. CONNALLY, JR.,
Colonel, JAGC,
Assistant Judge Advocate General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 936699 697